(6)

No. 02-1371

Supreme Court, U.S.
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In The

Supreme Court of the United States

STATE OF MISSOURI,

Petitioner,

v.

PATRICE SEIBERT,

Respondent.

On Writ Of Certiorari
To The Missouri Supreme Court

BRIEF FOR RESPONDENT

AMY M. BARTHOLOW
Assistant Public Defender
3402 Buttonwood Drive
Columbia, MO 65201
(573) 882-9855

Counsel of Record

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Should the rule of *Miranda v. Arizona*, which constitutionally *requires* the giving of warnings at the outset of a custodial interrogation as a "fully effective means" of protecting the Fifth Amendment privilege, be abrogated, in favor of making the warnings optional, to be administered solely at the discretion of law enforcement?

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STATEMENT OF THE CASE

On the morning of February 12, 1997, Patrice Seibert discovered that her 12-year-old son, Jonathan, had died in his sleep (TR 755-758, 836, 845, 858).[1] Cerebral palsy had left Jonathan blind and severely disabled (TR 754, 836, 854). Complications from that disease – perhaps a seizure – likely ended his life (JA 52-53; TR 760, 836).[2] Hysterical with grief, Seibert did not report Jonathan's death (TR 836, 845, 858).

While Seibert was away from her home that night, a fire killed Donald Rector and severely burned one of her older sons, Darian (JA 14-15; TR 734-735, 757, 866-867). Phelps County authorities opined that Seibert had aided or encouraged others to set the fire (LF 48). During two informal interviews with Police Detective Richard Hanrahan Seibert denied any involvement in the fire (JA 15-16, 24-26, 43-45). So, the Phelps County Prosecutor conferred with Hanrahan and instructed him to "make a case" against her (JA 54). On February 17, Hanrahan orchestrated Seibert's arrest on the charge of first degree murder, § 565.020, RSMo 1994 (JA 2, 45-46; LF 32, 48).

This time, Hanrahan arrested Seibert at a time and place that would maximize her grief and anxiety, and he utilized a "two-stage" interrogation technique that would exploit her emotional state (JA 42, 52-53). As the State concedes, he employed this technique deliberately (JA 18, 27-34, 52, 59). He withheld *Miranda* warnings from Seibert at the outset of the custodial interrogation for the

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[1] The record includes the Joint Appendix (JA), transcript (TR), legal file (LF).

[2] Petitioner implies that Seibert did not feed Jonathan (Pet. Br. 2), ignoring the medical examiner's testimony that malnourishment does not necessarily mean that a person was denied food (TR 761). Indeed, the examination showed that Jonathon had eaten 6-8 hours before his death. *Id.*

express purpose of extracting a statement to be used against her at trial (JA 52-54). As the State describes, Hanrahan administered warnings only after he had obtained a statement from her and "the 'cat [was] out of the bag.'" (Cert. Pet. 4). Then, referencing the unwarned statement, he led Seibert to repeat it (JA 33-34).

After trial, the State acknowledged that Hanrahan "feared if he Mirandized the defendant, she might not volunteer information."[3] "He had been taught that suspects are more likely to confess the second time, even after *Miranda* warnings, once they have implicated themselves." *Id.* "[A]n institute, from which [Hanrahan] received interrogation training, has promoted this type of interrogation 'numerous times' and [his] current [police] department, as well as those he was with previously, all subscribe to this training." (Cert. Pet. A-4, JA 31-32).

At the time of her arrest Seibert was with her son, Darian, in a burn center in St. Louis, approximately 100 miles from her home (JA 42, 52). Darian was near death (JA 53). Jonathan's funeral was scheduled for the next day (JA 57). Hanrahan and two other officers, Fire Marshall Rodger Windle and St. Louis Officer Kevin Clinton, awakened Seibert at 3:00 a.m. (JA 45-46, 51-52). Hanrahan realized that Seibert was grief-stricken; she was crying and upset during the interrogation (JA 53). Later, Hanrahan placed her on suicide watch (JA 23, 61-62).

Hanrahan arranged for Clinton to make the arrest, instructing him to withhold from Seibert her constitutionally-required *Miranda* warnings (JA 26-28, 51-52). Hanrahan withheld the warnings from Seibert because he

[3] *See* Missouri Attorney General's *Front Line Report*, a newsletter for Missouri's law enforcement officers. It reports that this training was "faulty," and that no "certified police academy in Missouri" teaches it. Available on-line at http://www.ago.state.mo.us/032003fl.pdf. (last visited, Oct. 3, 2003).

"certainly" wanted her to talk (JA 52). Clinton transported Seibert to the stationhouse, and Hanrahan and Windle followed in their car, discussing their strategy for interrogating her (JA 54-55).

At the police station, Officer Clinton informed Hanrahan that, during the drive, he had told Seibert that "from what he knew, we had a very strong case, and it would be best to tell the truth." (JA 55). Hanrahan placed Seibert in a small interview room, leaving her to sit for fifteen to twenty minutes, expecting this to "create a considerable amount" of stress (JA 56).

At 3:45 a.m., Hanrahan entered the room, pulled his chair close to Seibert, and began interrogating her without providing *Miranda* warnings (JA 34, 56, 59).[4] He told her that he knew she was guilty, that she had been lying to him previously, that her lies were hurting her, and that telling the truth would make her feel better (JA 29, 47). The unwarned interrogation persisted for 30 minutes (JA 30-31, 59). During this time, Hanrahan showed Seibert a picture of Mr. Rector's burned body (JA 57).

Hanrahan wanted to interrogate Seibert without *Miranda* warnings in order to obtain a confession, and then induce her to verify it on tape following *Miranda* warnings (JA 30-32, 34, 38, 937). He described his "technique" this way:

> Basically, you're rolling the dice. You're doing a first stage where you understand that if you're told something that when you do read the *Miranda* rights, if they invoke them, you can't use what you were told. We were fully aware of that. We went forward with the second stage, read *Miranda*, and she repeated the items she had told us. (JA 35-36).

[4] Hanrahan did not turn on his recorder until the second half of the interrogation (JA 30-31, 58-59).

During the first stage, Seibert denied participating in the fire, which was consistent with her prior interviews with Hanrahan (JA 36). But he pressed her until she acceded to his version of events (JA 36-37). Seibert agreed that she knew the house was going to be burned, but she would not agree that she knew Mr. Rector was going to die in the fire (JA 59). So Hanrahan put his hand on her arm, squeezed it, and repeatedly coaxed, "Donald was also to die in his sleep." (JA 59). Seibert was sobbing at this point (JA 59). When she finally said what Hanrahan believed was the truth, he took "a formal statement." (JA 60).[5]

After a brief pause, Hanrahan began the second stage of the interrogation, using a tape recorder (JA 30, 60). The recorded statement "repeat[ed]" the unwarned statement (JA 30). The tape begins with Hanrahan reading the *Miranda* warnings (JA 65-66). Seibert signed a waiver form, and Hanrahan reminded her, "[W]e've been talking for a little while about what happened on Wednesday the twelfth, haven't we?" (JA 60, 66). He told her that he would "try to help [her] along" (JA 60, 66). Turning to the subject of Mr. Rector, Hanrahan reminded Seibert, "Now, in discussion you told us . . . that there was an understanding about Donald." (JA 70). When Seibert agreed, he told her to describe the "understanding." (JA 70). Seibert again denied knowing that others were going to leave him in the fire, "I, I never even thought about it. I just figured they would [get him out of the trailer]." (JA 70). Hanrahan

[5] Even if Seibert had known and asserted her rights, Hanrahan's *modus operandi* suggests that he would have persisted, as he did with Darian. *See State v. Darian Seibert*, 103 S.W.3d 295, 300 (Mo.App.2003) ("[S]till hospitalized for treatment of burns he suffered in the fire, [Darian] was questioned by Officer Richard Hanrahan in a recorded interview . . . [Darian] stated during and immediately after the reading of [his Miranda] rights that he wanted to talk with a lawyer. Hanrahan continued the conversation, referring to evidence that had been gathered, and eventually read [Darian] his rights a second time [and obtained statements].")

immediately confronted Seibert with her unwarned statement, asking, "didn't you tell me that he was supposed to die in his sleep?" (JA 70). Seibert agreed it was possible that he could (JA 70).

Seibert moved to suppress the entire interrogation as violating *Miranda* and as being involuntary (JA 4-5). As Hanrahan expected, the trial court suppressed the unwarned statements, but cautiously admitted the warned one, saying, "[W]e'll see what happens." (JA 40). Hanrahan testified at trial and recounted the tape-recorded statement (JA 42-62).[6] Over renewed objection, the court admitted the tape, its transcript and Seibert's waiver (JA 49-51). The court played the tape, letting jurors follow along with a transcript (JA 48-51, Exs. 37, 42 & 43). They convicted Seibert of second degree murder (JA 2).

The Missouri Court of Appeals affirmed, but the Missouri Supreme Court granted Seibert's application for transfer and reversed (JA 3). It found that Seibert's waiver and subsequent confession were involuntary (Cert. Pet. A-12). Under the specific facts of the case, the Court presumed that withholding warnings was a tactic to elicit a confession by depriving Seibert of the ability to knowingly and intelligently assert or waive her privilege (Cert. Pet. A-12). It found, "[I]n situations such as these, where the accused is subjected to a nearly continuous period of interrogation, it is unreasonable to assume – and there is nothing in the record to support such an assumption – that the simple recitation of *Miranda* would resurrect the opportunity to obtain a voluntary waiver." (Cert. Pet. A-10-A-11).

[6] Petitioner says defense counsel elicited part of the unwarned statements (Pet. Br. 4, fn 2). But the State had already elicited that Hanrahan had a pre-*Miranda* conversation with Seibert and had played the audio tape of the warned statement. (JA 46, 51). The jury had heard Hanrahan reminding Seibert of the specifics of her unwarned statement. (JA 66, 70).

The Court did not create an irrebuttable presumption that a waiver and subsequent statement would always be involuntary where there was a deliberate violation. It noted that, under different facts, the violation might be sufficiently attenuated, such as where the subsequent statements were not coerced because the second interrogation was held the next day, at a different location, and with different officers. (Cert. Pet. A-11).

SUMMARY OF ARGUMENT

This case presents a direct assault on *Miranda v. Arizona*, 384 U.S. 436 (1966) and the Fifth Amendment requirements that this Court recently declared to be so "embedded in routine police practice" that they "have become part of our national culture." *Dickerson v. United States*, 530 U.S. 428, 443 (2000). Hanrahan knew that *Miranda* and its progeny obligated him to advise Seibert of her rights *prior to* any questioning. He nevertheless deliberately withheld what the law demands, seeking to extract a statement. Hanrahan "rolled the dice," betting that judges would look the other way. Missouri has now upped the ante, asking this Court to erase one of *Miranda*'s key holdings and make the mandatory warnings optional. But defiance of the law and this Court's decisions ought not be tolerated or rewarded. This Court should reject Petitioner's bad-faith exception to *Miranda*.

The statement admitted against Seibert was undisputedly the product of Hanrahan's improper tactics and her first, unwarned statement. Hanrahan received orders from the prosecutor to "make a case" against Seibert, and he choreographed an interrogation aimed at doing just that. Calculating a time and place that would maximize her grief and anxiety, Hanrahan directed Seibert's arrest at 3:00 a.m., taking her from the burn unit where her oldest son lay dying, and with the funeral for her younger son scheduled for the next day. He instructed the arresting officer to withhold the required warnings. Then, utilizing

the inherent coercion of the stationhouse, Hanrahan first left Seibert alone in a tiny room to evoke more stress. Upon rejoining her, he accused her of lying, telling her that her lies were hurting her and that he already knew the truth. He confronted her with pictures of Mr. Rector's body. When she continued to deny knowing that Mr. Rector would die in the fire, Hanrahan squeezed her arm and repeated "Donald was to die in his sleep," until, sobbing, she finally agreed with him. Only then, after a brief pause, did he give her warnings. But when "warnings c[o]me at the end of the interrogation process . . . an intelligent waiver of constitutional rights cannot be assumed." *Westover v. United States*, 384 U.S. 436, 496 (1966).

Hanrahan "roll[ed] the dice" because he had been trained that suspects were less likely to assert their privileges after giving an unwarned statement. His gamble paid off; Seibert agreed to talk. Still, Hanrahan could only extract the duplicate statement by exploiting the unwarned statement to prevent any deviations. Only exclusion will deter this two-step technique and provide meaningful protection for the Fifth Amendment. Without strong exclusion, *Miranda* is ineffectual.

Oregon v. Elstad, 470 U.S. 298 (1985) did not invite this two-step technique; in fact, it rejected the "apocalyptic" prediction of it. Rather, *Elstad* provided a safe, but narrow, harbor for officers whose inadvertent failure to warn was reasonable and who did not exploit the existence of the unwarned statement. *Elstad* specifically exempted from its narrow rule "deliberately coercive or improper tactics in obtaining the initial statement." *Id.* at 314. "Improper tactics" are interrogation techniques *likely* to render a confession not the product of a suspect's free will, *regardless* of whether her will was actually overborne. The two-step is an "improper tactic" that renders unattenuated waivers and subsequent statements involuntary.

When coercive or improper tactics are used in "consecutive confession" cases like this one, *Westover* controls and requires the government to prove attenuation between

the statements and the lack of exploitation of the first statement. This is precisely the analysis that the Missouri Supreme Court followed. It did not create a per se rule of exclusion; rather, it correctly followed *Elstad* in rejecting this "calculated," improper tactic and in applying an attenuation analysis to the facts presented. This Court should affirm.

ARGUMENT

I. THIS COURT SHOULD EXCLUDE ALL EVIDENCE ACQUIRED THROUGH HANRAHAN'S WILLFUL AND UNREASONABLE VIOLATION OF *MIRANDA*.

First interpreting the Self-Incrimination Clause, 117 years ago, this Court warned:

> [I]llegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure . . . It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.

Boyd v. United States, 116 U.S. 616, 635 (1886). This case presents the most serious encroachment upon the Fifth Amendment privilege today: the strategic disregard of the "constitutional requirements" designed to protect it. *Dickerson v. United States*, 530 U.S. 428, 438 (2000). Deliberate *Miranda* violations are no longer "a speculative possibility." *See Oregon v. Hass*, 420 U.S. 714, 723 (1975). The practice is well-documented, and it is spreading.

In *Miranda v. Arizona*, 384 U.S. 436 (1966), this Court sought a comprehensive solution for the problems arising from the combination of custodial interrogation, coercion and compelled self-incrimination. It realized that without proper safeguards, custodial interrogation imposes inherently coercive pressures that undermine a suspect's will to

resist, compelling her to speak when she would not otherwise do so freely. *Id.* at 467. Thus, *Miranda* laid down "concrete constitutional guidelines for law enforcement agencies and courts to follow." *Id.* at 442. Because "the coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements," *Miranda*'s procedures simultaneously protect the Fifth Amendment privilege and avoid many issues of voluntariness under the Due Process Clause. *See Dickerson*, 530 U.S. at 435, 444.

Miranda has two essential components – one directing police, the other guiding courts. To combat the inherent coercion of the stationhouse and to provide a full opportunity to exercise the privilege, police must effectively apprise the suspect of her rights. Such warnings and a valid waiver must precede any custodial interrogation, and police must heed the suspect's decision to remain silent or consult counsel. *Miranda*, 384 U.S. at 467, 473-474. Courts then must exclude statements obtained during custodial interrogation unless the prosecution shows valid warnings and waiver. *Id.* at 479.

Petitioner assails both components, arguing that warnings should be optional and that statements obtained via deliberate *Miranda* violations should be admitted. It collapses the two components, asking this Court simply to approve any interrogation tactic regardless of its coercive effect. In the thirty-seven years since *Miranda*, this Court has refined the definitions of "custody" and "interrogation" (*see, e.g., Stansbury v. California*, 511 U.S. 318 (1994) (*per curiam*); *Rhode Island v. Innis*, 446 U.S. 291 (1980)), and has let officers question suspects without warnings when necessary for public safety. *See New York v. Quarles*, 467 U.S. 649 (1984). The Court has also occasionally permitted the limited use of evidence obtained through a failure to follow *Miranda*'s procedures, though in every case the failure has not been deliberate. *See, e.g., Harris v. New York*, 401 U.S. 222 (1971); *Michigan v. Tucker*, 417 U.S.

433 (1974). Except to protect public safety, this Court has never held that the warnings are *optional*.

Petitioner's radical revision of *Miranda* would fail to protect the Fifth Amendment privilege and would let officers extract – and courts admit – involuntary statements in violation of the Due Process Clause. This Court should therefore exclude all evidence obtained from objectively unreasonable violations of *Miranda*. Such a rule would accord with this Court's precedents, including *Oregon v. Elstad*, 470 U.S. 298 (1985).

A. Warnings are "constitutionally required," not simply discretionary tools for law enforcement.

Miranda jurisprudence reflects this Court's abiding concern to effectuate the "underlying purposes of the *Miranda* rules," and maintain "the proper balance between society's legitimate law enforcement interests and the protection of the defendant's Fifth Amendment rights." *Moran v. Burbine*, 475 U.S. 412, 424 (1986). Petitioner seeks to tip that careful balance wholly towards law enforcement. But this Court's balanced approach contemplates "legitimate" law enforcement activity, which cannot include the "Missouri two-step." While "questioning is undoubtedly an essential tool in effective law enforcement," *Haynes v. Washington*, 373 U.S. 503, 519 (1963), *custodial* questioning is "legitimate" only when it complies with *Miranda*. The Missouri two-step is calculated to undermine a suspect's free will by subjecting her to coercive interrogation without notice of or opportunity to exercise her rights and then exploiting the product of the unwarned questioning to obtain an "admissible" duplicate. Some police trainers reject this tactic,[7] but Hanrahan and

[7] The Reid Institute condemned Petitioner's speculation in its cert. petition that Reid teaches this technique. Its materials "scrupulously

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a growing number of officers around the country are being trained to violate *Miranda*.

Miranda binds the police. Absent other fully effective procedures, a suspect *must* receive four warnings *prior to* any questioning: she has the right to remain silent, anything she says can be used against her in a court of law, she has the right to the presence of an attorney, and if she cannot afford an attorney one will be appointed for her prior to any questioning if she so desires. *Miranda*, 384 U.S. at 479. The State concedes this rule's constitutional footing, but asserts that *Miranda* is unconcerned with deterring misconduct and that warnings are optional. This ignores a long history of requiring warnings to protect individuals from police overreaching.

This Court uses only mandatory language when describing the timing of the warnings.[8] Just two terms ago, this Court reiterated that "*there can be no doubt* that a

teach . . . that if a suspect is in custody he/she must first be advised of their Miranda rights and make the appropriate waiver before any questioning can take place." *See* http://www.reid.com/legalupdates.html. (last visited October 3, 2003).

[8] *See e.g.*, *Davis v. United States*, 512 U.S. 452, 457 (1994) (police must explain rights "before questioning begins"); *Stansbury*, 511 U.S. at 322 (a person . . . "must first be warned that he has a right to remain silent . . . "); *Berkemer v. McCarty*, 468 U.S. 420, 429 (1984) ("Prior to any questioning, the person must be warned"); *Tucker*, 417 U.S. at 444 and *Quarles*, 467 U.S. at 654 (1984) (requiring *Miranda* warnings "prior to questioning" reinforces the Fifth Amendment right); *Orozco v. Texas*, 394 U.S. 324, 326 (1969) (statement excluded when officers questioned "without first informing him of his right[s] . . . "); *Connecticut v. Barrett*, 479 U.S. 523, 528 (1987) (*Miranda*'s "fundamental purpose [is] to assure that *the individual's right to choose* between speech and silence remains unfettered throughout the interrogation process.") (emphasis in original); *Moran*, 475 U.S. at 426 ("*Miranda* . . . giv[es] the *defendant* the power to exert some control over the . . . interrogation") (emphasis in original); *Duckworth v. Eagan*, 492 U.S. 195, 201 (1989) (*Miranda's* safeguards "*require* police to advise . . . *before* commencing custodial interrogation.").

suspect *must* be apprised of his rights against compulsory self-incrimination and to consult with an attorney before authorities may conduct custodial interrogation." *Texas v. Cobb*, 532 U.S. 162, 171 (2001) (citing *Dickerson*, 530 U.S. at 435, and *Miranda*, 384 U.S. at 479).[9] It also uses mandatory language in requiring officers to honor clear invocations of rights.[10]

Against the weight of these cases, Petitioner objects that this Court lacks authority to "mandate a code of behavior for state officials wholly unconnected to any federal right or privilege." (Pet. Br. 10-11) (quoting *Moran*, 475 U.S. at 425). But Petitioner ignores that *Miranda*'s procedures are directly tied to "a federal right or privilege" – the Fifth Amendment – making Petitioner's weak protest irrelevant. Indeed, *Dickerson* struck down a

[9] All emphasis in quoted materials has been added, unless otherwise noted.

[10] *See, e.g., Davis*, 512 U.S. at 458 ("If a suspect requests counsel at any time during the interview, he is not subject to further questioning."); *McNeil v. Wisconsin*, 501 U.S. 171, 176-77 (1991) ("Once a suspect asserts the right [to counsel], . . . interrogation [must] cease."); *Minnick v. Mississippi*, 498 U.S. 146, 153 (1990) ("When counsel is requested, interrogation must cease."); *Arizona v. Roberson*, 486 U.S. 675, 682 (1988) ("After a person in custody has expressed his desire to deal with the police only through counsel, he 'is not subject to further interrogation.'") (quoting *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1980)); *Barrett*, 479 U.S. at 528 ("Once the accused 'states that he wants an attorney, the interrogation must cease.'") (quoting *Miranda*, 384 U.S. at 474); *Edwards*, 451 U.S. at 485 (once the right to counsel is "exercised by the accused, 'the interrogation must cease.'") (quoting *Miranda*, 384 U.S. at 474); *Innis*, 446 U.S. at 293 ("In *Miranda* [ ], the Court held that, once a defendant in custody asks to speak with a lawyer, all interrogation must cease until a lawyer is present.") (citation deleted); *Fare v. Michael C.*, 442 U.S. 707, 719 (1979) ("An accused's request for an attorney is per se an invocation of his Fifth Amendment rights, requiring that all interrogation cease."); *Miranda*, 384 U.S. at 473-74 ("If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.") (footnote omitted).

federal statute, 18 U.S.C. § 3501, as unconstitutional *precisely because it failed to require pre-interrogation Miranda warnings* or provide equally effective alternatives to protect the privilege:

> *Miranda* requires procedures that will warn a suspect in custody of his right to remain silent and which will assure the suspect that the exercise of that right will be honored. *See, e.g.*, 384 U.S. at 467 . . . [Section] 3501 explicitly eschews a requirement of pre-interrogation warnings in favor of [viewing] the administration of such warnings as only one factor in determining the voluntariness of a suspect's confession. The additional remedies cited by *amicus* do not, in our view, render them, together with § 3501 an adequate substitute for the warnings required by *Miranda*.

Dickerson, 530 U.S. at 442. As Justice Kennedy noted last term, "[o]ur cases and our legal tradition establish that the Self-Incrimination Clause is a substantive constraint on the conduct of the government, not merely an evidentiary rule governing the work of the courts." *Chavez v. Martinez*, 123 S.Ct. 1994, 2014 (2003) (Kennedy, J., concurring in part and dissenting in part). "The *Miranda* warning, as is now well settled, is a constitutional requirement adopted to reduce the risk of a coerced confession and to implement the Self-Incrimination Clause." *Id.* (citing *Dickerson*, 530 U.S. at 444).

Petitioner contorts *Chavez*, *supra*, to argue that if the Fifth Amendment is only violated at trial, protecting the privilege is not required and deliberate police misconduct need not be deterred (Pet. Br. 40). In *Chavez*, four members of this Court concluded that the Fifth Amendment is violated only when compelled evidence is admitted at a criminal trial. This holding is not inconsistent with a belief that *Miranda*'s procedures are also required *to protect* the privilege. Even if the Fifth Amendment is violated only when compelled testimony is introduced, rules that regulate out-of-court conduct provide guidance to police and

reduce the "unacceptably great" risk that compelled statements *will* be admitted. *See Dickerson*, 530 U.S. at 442. Three other members of this Court agreed with Martinez that the Fifth Amendment *can* be violated by coercive out-of-court conduct, and two members concluded only that out-of-court compulsion, not violating the Fifth Amendment, does not warrant civil damages.

The plurality holding in *Chavez* is precisely why protecting the core guarantee must emanate from a robust exclusionary rule in the criminal case. This case, unlike *Chavez*, clearly implicates the core Fifth Amendment value: Seibert's statement *was* admitted against her at trial. With no civil remedy to directly counteract willful violations, exclusion remains the only powerful tool at this Court's disposal to ensure that police officers respect *Miranda* in the stationhouse and do not flout *Dickerson's* constitutional command. 530 U.S. at 434-435. Expanded protection of the privilege is justified when the core guarantee, or the judicial capacity to protect it, would be placed at risk in the absence of such complementary protection. *See Chavez*, 123 S.Ct. at 2007 (Souter, J., concurring). Deliberate or objectively unreasonable *Miranda* violations endanger both the core guarantee and this Court's capacity to protect it.

The United States concedes that "Miranda itself does contain language that purports to establish rules for the conduct of the police" and that later cases "speak of assessing whether particular applications of the Miranda exclusionary rule would deter departures from those procedures." (U.S. Amicus Br. 19). Indeed, such regulation provides the only "assurance that practices of this nature will be eradicated in the foreseeable future." *Miranda*, 384 U.S. at 447.[11] "The Constitution is based upon the theory

[11] It is not only this Court that has understood *Miranda* to regulate police conduct. The Solicitor General has argued that "*Miranda* regulated the conduct of police custodial interrogation by devising

(Continued on following page)

that when past abuses are forbidden the resulting right has present meaning." *Chavez*, 123 S.Ct. at 2013 (Kennedy, J., concurring in part and dissenting in part). And "exclusionary rules are very much aimed at deterring lawless conduct by police . . . " *Colorado v. Connelly*, 479 U.S. 157, 169 (1986) (addressing *Miranda* exclusion). The "core virtue of *Miranda* would be eviscerated if the prophylactic rules were freely [ignored] by . . . courts under the guise of [reinterpreting] *Miranda*. . . . " *Quarles*, 467 U.S. at 664 (O'Connor, J., concurring and dissenting in part) (*quoting Fare v. Michael C.*, 439 U.S. 1310, 1314 (1978) (Rehnquist, J., in chambers on application for stay)). "An argument that a rule of law may be ignored, avoided, or manipulated simply because it is 'prophylactic' is nothing more than an argument against the rule of law itself." *Michigan v. Harvey*, 494 U.S. 344, 369 (1990) (Stevens, J., dissenting). But, this is exactly what Petitioner seeks: the elimination of Fifth Amendment protection by extending *Elstad* to encompass deliberate and objectively unreasonable *Miranda* violations. This Court must decline.

B. *Miranda* warnings cannot serve their protective purpose unless they are given "at the outset" of questioning.

"A reasonable and faithful interpretation of the *Miranda* opinion must rest on the intention of the Court . . . to adopt 'fully effective means . . . to notify the person of his right of silence and to assure that the exercise of the

prophylactic safeguards," and "it was the psychological technique of subtly instilling that fear in a suspect in custody that *Miranda* sought to counteract through the requirement of warnings." (*Illinois v. Perkins*, U.S. Amicus Br. 10, 15); and "[W]e also recognize the *Miranda* exclusionary rule is designed to deter abusive police questioning practices." (*Elstad*, U.S. Amicus Br. 7). The Solicitor General's understanding of *Miranda* has definitely "evolved."

right will be scrupulously honored.'" *Michigan v. Mosley*, 423 U.S. 96, 104 (1975). "[T]he *Miranda* decision . . . was designed to give *meaningful* protection to Fifth Amendment rights." *Mathis v. United States*, 391 U.S. 1, 4 (1968). The Missouri two-step gives no "meaningful" or "fully effective" protection.

Petitioner claims that the warnings were "carefully" and "proper[ly]" administered at the outset of the "second interrogation." (Pet. Br. 26, 47). This ignores the Missouri Supreme Court's factual finding that Hanrahan conducted *one* continuous interrogation in two stages (Cert. Pet. A-12). The two-step did not "adhere to the dictates of *Miranda*." Of course, "it is entirely possible to extract a compelled statement despite the most precise and accurate of warnings." *Withrow v. Williams*, 507 U.S. 680, 712-713 (O'Connor, J., dissenting) (1993). But the question is not whether warnings are recited by rote, but whether the warnings provided a "fully effective means" of protection. *Mosley, supra*.

In *Miranda*, this Court made clear that midstream warnings are *not* effective and result in an involuntary waiver. *See Westover*, 384 U.S. at 494-497 (when "warnings c[o]me at the end of the interrogation process . . . an intelligent waiver of constitutional rights cannot be assumed."). "Proper administration" does not contemplate post-confession warnings, but giving them "at the outset of the interrogation" and "prior to questioning." *Miranda*, 384 U.S. at 467-68, 479. To pretend that a new interrogation began after a "momentary cessation" would frustrate *Miranda*'s mandate by allowing "repeated rounds of questioning" to undermine the will of the suspect. *Mosley*, 423 U.S. at 102 (Mosley received full *Miranda* warnings "at the very outset of *each* interrogation"). Only after a pronounced break could Seibert have returned to the status quo ante of a suspect not under the pressure of interrogation.

To assert that Hanrahan "carefully administered" the warnings at the outset of the "*second* interrogation,"

Petitioner has had to drastically restructure its description of the facts. In its cert. petition, it described this technique as "an interrogation . . . in two stages." (Cert. Pet. 4). But in its brief, Petitioner describes "two interrogations" (Pet. Br. 20). The obvious reason for this change is that it allows Petitioner to argue that the warnings were given at the "outset" of the second, purportedly cleansing the violation.

This Court should not accede to such a ploy. Hanrahan did not administer warnings at a meaningful time or in a meaningful manner. This Court has long refused to "give any weight to recitals which merely formalize constitutional requirements," warning that "formulas of respect for constitutional safeguards . . . may not become a cloak for inquisitorial practices and make an empty form of the due process of law for which free men fought and died to obtain." *Haley v. Ohio*, 332 U.S. 596, 601 (1948). Haley was taken from his home in the middle of the night and questioned at the police station without advisement of his right to counsel. His confession was reduced to writing, preceded by rote warnings. While Haley agreed to the written confession, this Court found that he could not appreciate the belated advisement or freely exercise his rights.

Describing the "callous attitude of the police towards the procedural safeguards," this Court took "with a grain of salt" the officer's assurances that he interrogated Haley "in a fair and dispassionate manner." *Id.* This Court should likewise view with skepticism Petitioner's assurances that the unwarned questioning of Seibert was not coercive. The Missouri Supreme Court held that only "under circumstances that differ from those in [Seibert's] case" could Petitioner show that the first statement was voluntary (Cert. Pet. A-9). Hanrahan's two-step technique mirrors the coercive tactics that *Miranda* sought to counteract, and the belated warnings gave Seibert no meaningful ability to choose between speech and silence. As this

case demonstrates, belated warnings do little to prevent involuntary statements.

Factually, the 15-20 minute pause in questioning cannot be distinguished from the common situation where an officer leaves the room to check on other evidence. This pause was nothing but an intermission during one interrogation. At its logical end, Petitioner's argument would allow an officer to reduce an unwarned statement to writing, prefaced by written warnings. If the suspect reads and signs the statement, it would then be admissible. But this Court has rejected that procedure. *See Davis v. North Carolina*, 384 U.S. 737, 740 (1966).

For a suspect ignorant of her rights, withholding warnings until a statement is extracted fails to provide a meaningful choice between speech and silence. But an express violation of *Miranda* may have a greater impact on a suspect who *knows* her rights. Most citizens reasonably believe that the police are supposed to obey the law while enforcing the law. *Spano v. New York*, 360 U.S. 315, 320 (1959). But when a suspect concludes that the officer has no regard for her rights or for the law itself, that conclusion may generate fear that any refusal to comply with demands for answers will trigger police retaliation. The suspect's realization that *Miranda*'s promise is false will make interrogation a more coercive experience than it is already.[12]

Dickerson reaffirmed the timing of the warnings by holding that a federal statute that "eschew[ed] a requirement of *pre-interrogation* warnings" failed to provide constitutionally adequate protections for the Fifth Amendment privilege. 530 U.S. at 442. The two-step is based on a fear that, if warned, a suspect will invoke her rights. But "no system of criminal justice can, or should,

[12] *See* Charles D. Weisselberg, *Saving* Miranda, 84 Cornell L. Rev. 109, 153-162 (1998).

survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights. No system worth preserving should have to fear that . . . an accused . . . will become aware of, and exercise, [her] rights." *Escobedo v. Illinois*, 378 U.S. 478, 490 (1964).

C. If this Court permits the use of evidence obtained in deliberate violation of *Miranda*, officers nationwide will be trained to do the "Missouri two-step."

A decade ago, this Court had "little reason to believe that the police [were] unable, or even generally unwilling, to satisfy *Miranda*'s requirements." *Withrow*, 507 U.S. at 695. The dissent also believed it could "depend on law enforcement officials to administer warnings in the first instance." *Withrow*, 507 U.S. at 714 (O'Connor, J., dissenting). Officers have "adjusted to [*Miranda*'s] strictures." *Quarles*, 467 U.S., at 663 (O'Connor, J., concurring in part and dissenting in part) (*quoting Innis*, 446 U.S. at 304) (Burger, C.J., concurring). But the growing trend of willful *Miranda* violations must give this Court pause. "Adjustment" to *Miranda* did not contemplate strategically withholding the warnings. Trust that officers are following *Miranda* is necessarily eroded by proof to the contrary. Far from a "dearth of horribles,"[13] deliberate *Miranda* violations have become a stark reality. The scope of exclusion is subject to change in light of changing judicial understanding about the effects of the rule outside the courtroom. *See*

[13] In *Atwater v. City of Lago Vista*, 532 U.S. 318, 353-354 (2001), the "dearth of horribles" referred to Petitioner's inability to show "anything like an epidemic of [warrantless] minor-offense arrests." *See also Cobb*, 532 U.S. 171 (Scrupulous adherence to *Miranda's* pre-interrogation warning requirement will prevent a "parade of horribles" involving violations of constitutional rights).

United States v. Leon, 468 U.S. 897, 928 (1984) (Blackmun, concurring).

Petitioner concedes that "[l]aw enforcement officers recognize the value of questioning suspects 'outside *Miranda*'" and that "there are already nationwide efforts to encourage officers to do so." (Cert. Pet. 16-17). "[V]arious techniques" can "overcome the perceived 'obstacles' created by *Miranda*." (Cert. Pet. 3-4). The record in this case – together with Petitioner's unabashed arguments – show that officers will violate *Miranda* if given room to do so.

Beyond Petitioner's concessions, willful violations are well-documented.[14] Widely-distributed training materials encourage officers to disregard *Miranda*'s procedures. *See, e.g.*, Weisselberg, 84 Cornell L. Rev. at 189-92 (reprinting transcript of training video). The sobering experience of the California courts proves that a strong rule of exclusion is necessary for *Miranda*'s survival. For years, California officers were taught to question suspects in violation of *Miranda*. Courts were often called to adjudicate the admissibility of statements taken without warnings or over invocations. Sharply condemning[15] these tactics had no deterrent effect.[16]

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[14] *See, e.g., State v. Knapp*, 666 N.W.2d 881 (Wis. 2003) (intentional failure to give warnings); *People v. Neal*, 72 P.3d 280 (Cal., 2003) (deliberate questioning over invocation); Elwood Sanders, Jr., *Willful Violations of Miranda: Not a Speculative Possibility but an Established Fact*, 4 Fla. Coastal L.J. 29 (2003) (surveying willful violations of *Miranda* and *Edwards* in 12 states); Charles D. Weisselberg, *In the Stationhouse After Dickerson*, 99 Mich. L. Rev. 1121, 1123-1153 (2001) (collecting "outside *Miranda*" California training materials); Charles D. Weisselberg, *Saving* Miranda, 84 Cornell L. Rev. 109 (1998) (reviewing the practice and theory of questioning "outside *Miranda*").

[15] *See, e.g., People v. Bradford*, 929 P.2d 544 (Cal. 1997) ("unethical" and "strongly disapproved."); *In re Gilbert E.*, 38 Cal.Rptr.2d 866 (Cal.App.1995) ("respect for the . . . law necessarily diminishes"); *People v. Bey*, 27 Cal.Rptr.2d 28 (Cal.App.1993) (expressing grave concern at

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This year, the California Supreme Court revisited the issue in *People v. Neal*, 72 P.3d 280 (Cal., 2003). This time, when another officer deliberately questioned a suspect over his repeated requests for counsel, the Court ruled that Mr. Neal's statement was involuntary and inadmissible for all purposes. A unanimous Court angrily noted that it had condemned this tactic time and again. *Id. Neal's* facts also demonstrate how abandoning *Miranda*'s bright line substantially increases the risk of a coerced confession.

Training materials from the California Department of Justice confirm that these practices persist, even as they are condemned by courts. One trainer noted that tainted statements had been held involuntary, but he did not advise officers to stop:

> [W]e on this program, or some of us in this program, have been encouraging you to continue to question a suspect after they've invoked their *Miranda* rights . . . [D]espite the fact we've been encouraging you to do this for the last eight years, some judges . . . have taken exception to that and everybody's entitled to their opinion, and certainly judges are entitled to think that "You know, that's just not a good idea." But some judges in the courts of appeals have gone so far as to find a way to prohibit those kinds of statements from coming in even for impeachment purposes.
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deliberate *Miranda* violation); and *People v. Baker*, 269 Cal.Rptr. 475 (Cal.App.1990) (deploring intentional *Miranda* violations).

[16] The California Supreme Court's unanimous condemnation in *People v. Peevy*, 953 P.2d 1212, 1224-1226 (Cal. 1998), had no impact. *See* Weisselberg, *In the Stationhouse After Dickerson*, 99 Mich.L.Rev. at 1148-52. A broadcast training video described the Court's warning as non-binding "dicta," and a training bulletin urged, "If you've caught the fish, don't fret about losing the bait." *See id.* at 1137-38, 1144.

> What it means is, our job is getting harder with respect to obtaining information from a suspect after they've invoked their *Miranda* rights. I'm not telling you, "Stop questioning him after that." The law under *Harris v. New York* . . . is what it is . . . and we want to take advantage of that to the extent that we can, but we need to be mindful that some judges, in some recent cases have come out with language that severely frowns upon this practice, and are going to presume that that practice is eliciting involuntary statements. What that means is, that in addition to getting them to make additional statements, you also have to establish something that we can use as evidence that these statements were voluntarily made.

Calif. Comm'n on Peace Officer Standards and Training ("POST") training video, *Miranda: Post-Invocation Questioning* (July 11, 1996).[17]

Further, this trainer provides a glimpse into what the criminal justice system can look forward to if the *Miranda* rules become optional:

> Somehow . . . you need to have the suspect to acknowledge a willingness to continue to speak even after he's invoked his *Miranda* rights.
>
> So for example, you read him his *Miranda* rights, and he invokes his right to silence. What can you do? You can ask him something like this: "Would it be O.K. if I continue to ask you a few questions about something related or even peripheral to the case?" Get him to acknowledge that it would be O.K. for you to continue to ask him those questions, or if he invokes his right to silence,

[17] This video was broadcast by ("POST") to officers statewide. A transcript of the video is available online at: http://www.cacj.org/policy_statements/policy_statement_12.htm.

> you could say, "Lookit, would it be O.K. if I turn the tape recorder off?" or "Would it be O.K. if I had my partner step out of the room and just you and I talked just one-on-one." If after setting the criteria, he acknowledges a willingness to talk or to answer some of your questions, at least that puts something on the record that we have acknowledging that these additional statements that he's going to be giving are voluntarily made.

Miranda: Post-Invocation Questioning, *supra*.

The Solicitor General argues that officers will still give warnings even if they are made optional (U.S. Br. at 20), but the evidence indicates otherwise.[18] Making warnings hortatory instead of mandatory will leave law enforcement with no meaningful guidance, requiring more courts to confront difficult voluntariness issues. There cannot be a gulf between the two halves of *Miranda*'s solution – provisions that bind officers and those that bind courts – or this Court risks returning to the pre-*Miranda* status quo, where only the Due Process Clause measures police actions and a statement's admissibility.

Elstad has not deterred objectively unreasonable *Miranda* violations. Petitioner agrees that deterrence is "limited" under *Elstad*, but suggests that "barring only the use of the unwarned statement [from] the prosecutor's case in chief would be a sufficient [deterrent] . . . " (Pet. Br. 40) (*citing Harris*, 401 U.S. at 225). However, "the deterrence of the exclusionary rule, of course, lies in the necessity to give the warnings." *Hass*, 420 U.S. at 723. Harris

[18] The Solicitor General argued differently in *Dickerson*, noting that without a warning requirement, "although many [officers] would continue to [warn], it is likely that some police departments would become less rigorous in requiring warnings, others might significantly modify them, and some police officers would [not give] warnings at all before conducting custodial interrogation." (*Dickerson v. U.S.*, Resp. Br. at 37.)

and Hass received timely warnings. Whatever deterrent effect results from suppressing an unwarned confession is eliminated if *Elstad* is read to allow officers to deliberately withhold warnings in order to gain an inadmissible confession and then "recover" the lost confession by simply reading the warnings and continuing the interrogation. *See* David A. Wollin, *Policing the Police: Should Miranda Violations Bear Fruit?*, 53 Ohio St. L.J. 805, 817 (1992). The likely result is that the Missouri two-step will spread more quickly if given this Court's imprimatur.

The prosecution cannot build its case with evidence that contravenes constitutional guarantees and their corresponding judicial protections. *Harvey*, 494 U.S. at 351. This Court has rejected arguments that would let a *defendant* turn the Government's illegally-obtained evidence to his advantage. *Harris*, 401 U.S. at 224; *Hass*, 420 U.S. at 722. The same should apply when the Government seeks to benefit from its illegal methods. When officers endeavor to undermine the privilege, this Court must intervene.

D. This Court should exclude all evidence obtained through deliberate or objectively unreasonable violations of Miranda.

When evaluating the propriety of an exclusionary rule, this Court "must consider whether the sanction serves a valid and useful purpose," keeping in mind that "[t]he deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct . . . " *Tucker*, 417 U.S. at 446-447. The valid and useful purpose here could not be more clear-cut. Willful *Miranda* violations are becoming widespread. Officers are being trained to violate *Miranda*. More and more suspects across this nation are being subjected to custodial interrogations without warnings or over invocations. Those presumed innocent are not getting notice of, or the opportunity to be heard on, the exercise of their rights. The warnings that were designed to safeguard

citizens' "precious Fifth Amendment rights" are being marginalized, or worse, treated as optional.

A decade before *Elstad*, this Court noted that the Fourth Amendment's exclusionary rule serves "to compel respect for the constitutional guaranty in the only effectively available way – by removing the incentive to disregard it." *Id.* (quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960)). It acknowledged that "in a proper case this rationale would seem applicable to the Fifth Amendment as well." *Id.* at 447. This deterrence rationale did not apply to *Tucker*, because the police had acted in good faith – they had followed the requirements of *Escobedo*, *supra*, the governing case law at the time. *Tucker*, 417 U.S. at 447. Therefore, bad-faith police conduct would not be significantly deterred if the derivative evidence were excluded. *Id.* at 447-448. Nor would exclusion make sense in *Elstad*, as the officer's failure to warn was inadvertent and excusable, and the officer did not exploit the mistake. By contrast, this is the proper case to apply an exclusionary rule. Hanrahan's conduct was both willful and inexcusable, and to ensure continued protection of the privilege, future violations must be deterred.

This Court should hold that when officers deliberately violate *Miranda* or withhold warnings when a reasonable officer under the circumstances would recognize the necessity to give them, both the warned and the unwarned statements will be presumed inadmissible. To counter that presumption, the government must show both attenuation between the statements and no exploitation of the unwarned statement.

Miranda itself contains an exclusionary rule. Officers must give warnings and allow the suspect an opportunity to invoke her rights. Exclusion deters violations of these procedures and ensures the reliability of trial testimony. If warnings are constitutionally required, *Dickerson*, *supra*, then they necessitate specific remedies to insure compliance. In every context where this Court has recognized obligatory rules of police conduct, it has concluded that

excluding derivative evidence is essential for meaningful deterrence of violations. *Miranda* deserves respect, and officers like Hanrahan will be deterred from doing the Missouri two-step only if its derivative evidence is suppressed. Otherwise, the unwarned statement will infiltrate the government's case-in-chief, as it did here, through an end-run of a constitutional rule.

1) This Court has applied the derivative evidence doctrine even to nonconstitutional violations.

Whether the two-step violates the Constitution or constitutional requirements, this Court has excluded derivative evidence of even nonconstitutional violations. In fact, the phrase "fruit of the poisonous tree" long predates *Wong Sun v. United States*, 371 U.S. 471 (1963). The first "tree" was not a constitutional violation. In *Nardone v. United States*, 308 U.S. 338 (1939), the government violated a federal wiretap statute, and this Court held that the actual, illegal wiretaps must be excluded from the government's case, but additionally, that the evidence derived from them must also be suppressed. "[T]o forbid the direct use of [illegally obtained evidence] . . . but to put no curb on [its] full indirect use would only invite the very methods deemed 'inconsistent with ethical standards and destructive of personal liberty.'" *Id.* at 340. Allowing evidence derived from the illegal method used to obtain the wiretaps "would largely stultify the policy which compelled" exclusion of the wiretaps themselves. *Id.*

This Court again applied the derivative evidence doctrine to a nonconstitutional violation in *Harrison v. United States*, 392 U.S. 219 (1968). There, the prosecution introduced a confession obtained in violation of the

McNabb-Mallory rule.[19] Harrison testified at trial to attempt to rebut the illegally obtained confessions, and he was convicted. That conviction was overturned because the confessions had been admitted. On retrial, the prosecution introduced Harrison's earlier testimony, and he was convicted again. This Court reversed the second conviction noting that if Harrison testified "to overcome the impact of confessions illegally obtained and hence improperly introduced, then his testimony was tainted by the same illegality that rendered the confessions themselves inadmissible." *Id.* at 222-223. Harrison's rebuttal testimony had been compelled by the use of the illegally-obtained confession, and could not be used on retrial. *Id.* "[T]he 'essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all.'" *Id.* (quoting *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920).

In *Elstad*, this Court observed that Harrison's Fifth Amendment rights had been "actually violated" when the introduction of the tainted confession, "compel[led] [him] to testify in rebuttal." *Elstad*, 470 U.S. at 316-317. *Elstad*'s use of *Harrison*'s legal construct is important to the analysis here because Harrison's illegal confession was not taken in violation of the Fifth Amendment, but of a "prophylactic" rule. Logically, *Elstad's* reference to *Harrison* acknowledges that the use (or exploitation) of a *Mallory*-tainted (here a *Miranda*-tainted) statement to obtain a subsequent statement results in Fifth Amendment compulsion. Indeed, *Elstad* emphasized that "the officers [did not] exploit the unwarned admission to pressure [Elstad] into waiving his right to remain silent." *Id.* at 316. "Exploitation" is also the key to *Wong Sun* exclusion:

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[19] The rule suppressed confessions taken during pre-presentment delay. *Mallory v. United States*, 354 U.S. 449 (1957); *McNabb v. United States*, 318 U.S. 332 (1943).

> The . . . question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by *exploitation of that illegality* or instead by means sufficiently distinguishable to be purged of the primary taint.'

Wong Sun, 371 U.S. at 488.

Hanrahan exploited Seibert's unwarned statement to extract a duplicate. Thus, the Missouri Supreme Court correctly concluded that Seibert's second statement was compelled and involuntary. (Cert. Pet. A-9–A-12). But this two-step technique relies upon exploitation and will very often yield involuntary statements. To deter such result, this Court should apply a broad exclusionary sanction to the deliberate or objectively unreasonable withholding of warnings. As the derivative evidence doctrine is concerned with deterring police misconduct that flows from violations of the Constitution, rules protecting the Constitution, or Congressional statutes, there is no logical reason that it should not apply to objectively unreasonable *Miranda* violations. If Congress cannot eliminate the warning requirement, *Dickerson, supra*, neither should the police be allowed to do so.

2) A test focused on objective circumstances is appropriate, but evidence of subjective intent, when available, remains a relevant factor.

When officers act unreasonably in withholding warnings, this Court should exclude all statements obtained, unless the government is able to show that subsequent statements have been attenuated and that the initial unwarned statement has not been exploited to obtain it. An objective test is appropriate. In fact, deterrence theory is designed to redress officers who act in objective bad faith, as Hanrahan did here. "By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in

their future counterparts, a greater degree of care toward the rights of an accused." *Tucker*, 417 U.S. at 447. It is no longer difficult for officers to determine the existence of custody or interrogation, and in the overwhelming number of cases, it will be simple to ascertain whether a failure to warn is unreasonable. The circumstances here, viewed objectively, were calculated to undermine Seibert's ability to exercise free choice during questioning.

When evidence of subjective intent is available, as it is here, it serves to aid the inquiry, but it need not unduly detain the courts. *Elstad*'s rule acknowledges the officer's subjective intent: "[S]imple failures to warn, unaccompanied by any actual coercion or other circumstances *calculated*[20] to undermine the suspect's ability to exercise his free will" do not taint the process. *Id.*, 470 U.S. at 309. The Missouri Supreme Court understood that Hanrahan's intent was relevant when determining the interrogation's effects on Seibert, and it followed *Elstad* in considering his intent (Cert. Pet. A-9). The factual record reflects that the two-step "was a tactic to elicit a confession and was used to weaken Seibert's ability to knowingly and voluntarily exercise her rights." (Cert. Pet. A-9).

Innis, supra, is a good example of how subjective intent can aid the objective inquiry. In *Innis*, this Court applied an objective test when asking whether the police should know that a certain practice is reasonably likely to evoke an incriminating response. But Innis' objective test did not reject subjective inquiry:

> This is not to say that the intent of the police is irrelevant, for it may well have a bearing on whether the police should have known that their words or actions were reasonably likely to evoke

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[20] "Calculated" means: deliberate, knowing, premeditated, reasoned, reflective, and willful. *See* http://thesaurus.reference.com/search?q=calculated.

> an incriminating response. In particular, where a [tactic] is designed to elicit an incriminating response from the accused, it is unlikely that [it] will not also be one which the police should have known was reasonably likely to have that effect.
>
> * * *
>
> Any knowledge the police may have had concerning the unusual susceptibility of a defendant . . . might be an important factor in determining whether the police should have known that their words or actions were reasonably likely to elicit an incriminating response from the suspect.

Id., 446 U.S. at 302, fn 7, 8, 9. Hanrahan knew that Seibert was "grief-stricken." And there was no other reason to arrest her at 3:00 a.m. but to ensure a more pliable suspect.

An objective test would examine the objective characteristics of Hanrahan's encounter with Seibert. A reasonable officer would have known that warnings were required when the interrogation began. But in *Elstad*, reasonable officers could have disagreed about custody, making it objectively reasonable not to give warnings. *Elstad* forgives the officer in this respect.[21] Reasonable officers could *not* disagree about Hanrahan's choreographed arrest and interrogation. Warnings were objectively required, but he instructed the arresting officer to withhold them, and he withheld them himself. This tactic is calculated to undermine Seibert's free will, and it did. The Missouri Court did not err, but followed *Elstad*, in considering Hanrahan's intent as part of the totality of the circumstances.

Petitioner also contorts *Moran*, *supra*, to support its argument. Petitioner notes that *Moran* focused on objective circumstances and their effect on the suspect. *Id.*, 475

[21] *Elstad* has been described as a "slippery" custody case. *Withrow*, 507 U.S. at 711 (O'Connor, J., dissenting).

U.S. at 425. But *Moran* involved the police treatment of an attorney, not the suspect: "Clearly, a rule that focuses on how the police treat an attorney – conduct that has no relevance at all to the degree of compulsion experienced by the defendant during interrogation – would ignore both *Miranda*'s mission and its only source of legitimacy." *Id.* at 425. "Events occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right." *Id.* at 422.

Moran held that officers need not tell a suspect that an attorney is attempting contact. Read in context, the conclusion that "the state of mind of the police is irrelevant to the question of the intelligence and voluntariness of the respondent's election to abandon his rights" makes sense. *Id.* at 423. But that does not aid Petitioner here. Unlike the failure to inform Burbine of an attorney's presence, the failure to notify Seibert of her rights directly affected the quality of her decision. Hanrahan withheld the very information that was constitutionally-required for Seibert to make an informed choice. Burbine was advised of his rights: "the Providence police followed these procedures with precision . . . administer[ing] the required warnings . . . and obtain[ing] an express written waiver prior to eliciting each of the three statements." *Id.* at 420. There was no causal link between the improper tactics and Burbine's waiver.

Petitioner also notes that in *Whren v. United States*, 517 U.S. 806, 810-813 (1996), this Court held that an officer's subjective intent is irrelevant to the validity of a traffic stop that is justified objectively by probable cause.[22] Hanrahan's interrogation of Seibert while withholding her

[22] *Whren* appears to have been a reluctant compromise because the Court "could discern no other, workable rule." *Maryland v. Wilson*, 519 U.S. 408, 422 (1997) (Kennedy, J., dissenting).

warnings is not objectively justified. Just four years later, this Court refused to extend *Whren* to the checkpoint program in *Indianapolis v. Edmond*, 531 U.S. 32 (2000). Instead, this Court looked subjectively into the "primary purpose" behind the checkpoint. This Court recognized the difficulties with subjective inquiry, but noted that "courts routinely engage in this enterprise in many areas of constitutional jurisprudence as a means of sifting abusive governmental conduct from that which is lawful." *Id.* at 46-47. As a result, "a program driven by an impermissible purpose may be proscribed while a program impelled by licit purposes is permitted, even though the challenged conduct may be outwardly similar." *Id.* at 47. "The program must be a bona fide effort to implement an authorized regulatory policy rather than a pretext for a dragnet search for criminals." *Edmond v. Goldsmith*, 183 F.3d 659, 665 (7th Cir. 1999) (analysis approved by *Edmond*, 531 U.S. at 47).

A court should look first at the objective circumstances of an interrogation, and in the overwhelming number of cases, that will decide the issue of reasonableness. Where there is also evidence of subjective intent, as there is here, that evidence can aid the inquiry. Hence, it is permissible to examine the goal of the Missouri two-step, as a factor in an objective test because "the purpose behind the [technique] is critical to its legality." *Id.* In the *Miranda* context, the advice of warnings must be a "bona fide effort" (i.e., a "fully effective means") to protect the privilege, not a circumvention of it.[23]

[23] One year after *Edmond*, Justice O'Connor again distinguished *Whren* noting the "significant qualitative differences between a traffic stop and a full custodial arrest." *Atwater*, 532 U.S. at 365-366 (O'Connor, J., dissenting) "While both are seizures that fall within the ambit of the Fourth Amendment, the latter entails a much greater intrusion on an individual's liberty and privacy interests." *Id.* Likewise,

(Continued on following page)

Moreover, when misconduct is deliberate, police are more likely to exploit it, as happened here, to gain unfair advantage over the suspect.[24] That is precisely why *Elstad* is narrowly confined to circumstances of "inadvertent oversight" and "mere failures to warn" – under such facts, this Court can rest assured that the suspect is protected from police overreaching, law enforcement is protected by the ability to correct pure mistakes, and the *Miranda* doctrine remains balanced.

E. Petitioner's proposed bad-faith exception to *Miranda* represents an extravagant extension of *Oregon v. Elstad*.

Elstad did not condone or invite the deliberate withholding of warnings. It denounced the "apocalyptic tone" of a dissenting prediction that deliberate violations would become routine. *Id.* at 318.[25] This Court made clear that *Elstad* "in no way retreats from the bright-line rule of *Miranda*." *Id.* at 317. Petitioner's assertion that the "technique" employed here "roughly approximates what occurred in *Elstad*,"[26] rings hollow (Cert. Pet. 4). But its further assertion – that law enforcement relied on *Elstad*

there are "significant qualitative differences" between the circumstances of *Elstad* and *Seibert*.

[24] "Long before *Miranda* . . . the Federal Bureau of Investigation had adopted a practice of administering warnings . . . before questioning . . . [in part] to ensure that agents treat suspects fairly . . . " (*Dickerson*, Resp. Br. at 33).

[25] Justice Brennan feared that the majority opinion would let police question a suspect twice – once inadmissibly, and once admissibly. *Id.* at 358 (Brennan, J., dissenting).

[26] Not even *Miranda's* dissenters would agree: "It is difficult to imagine the police duplicating in a person's home . . . those conditions and practices which the Court found prevalent in the station house . . . thought so threatening to the right to silence." *Orozco*, 394 U.S. at 329-330 (White, J., dissenting).

to develop "outside Miranda" questioning – goes too far (Cert. Pet. 3-4). Nothing in *Elstad* encouraged a belief that misconduct is permissible. Petitioner's proposed bad-faith exception to *Miranda* must be rejected.

Elstad introduced a narrow rule, based on this Court's concern that simple procedural errors, without more, should not destroy entire investigations. It provided a "safe harbor" where unexploited technical violations could be corrected. As portended by Justice Stevens, "the Court intends its holding to apply only to a narrow category of cases" where initial questioning occurs in a totally uncoercive setting and where the first confession had no influence on the second. *Id.* at 364. The majority did not reject this assessment.

If *Elstad* lies at one end of the spectrum of police conduct, *Seibert* anchors the other. In the context of exclusion, different violations "call for significantly different judicial responses . . . the clearest indication of attenuation [is required] in cases in which official conduct was flagrantly abusive . . . [a]t the opposite end of the spectrum lie 'technical' violations of . . . rights where, for example, officers in good faith arrest an individual in reliance on a warrant later invalidated." *Brown v. Illinois*, 422 U.S. 590, 610-612 (1975) (Powell, J., concurring). Similar distinctions can be drawn between the "technical" failure to warn during a brief encounter at a suspect's home and the calculated withholding of warnings during custodial stationhouse interrogation. While both are "custodial interrogations" falling within *Miranda*'s protection, the latter entails a greater "potentiality for compulsion" and risk to an individual's liberty interests. *Elstad* left the door open to exclude the latter.

Elstad regarded the officer's breach of *Miranda* as relatively innocent. "The arresting officers' testimony indicates that the brief stop in the living room . . . was not to interrogate [Elstad], but to notify his mother of the reason for his arrest." *Id.* at 315. The breach may have resulted from confusion about custody, or a reluctance to

initiate "an alarming police procedure" without speaking first to Elstad's mother. *Id.* at 315-316. Whatever the reason for the oversight, the incident had none of the "earmarks of coercion." *Id.* at 316. (citing *Rawlings v. Kentucky*, 448 U.S. 98, 109-110 (1980)). "Nor did the officers exploit the unwarned admission to pressure [Elstad] into waiving his right to remain silent." *Id.* But Hanrahan's interrogation involved both "earmarks" and "exploitation."

Interestingly, *Rawlings* is a Fourth Amendment case, wherein the officer's technical violation was not purposeful. *Rawlings* contrasted technical violations with the behavior of the officers in *Brown, supra,* which had "the quality of purposefulness." *Rawlings*, 448 U.S. at 110. And *Brown* cites *Westover*, *supra*, (*Miranda*'s companion involving mid-stream warnings during two-step interrogation), for the proposition that warnings alone and per se do not assure that a violation has not been exploited. *Brown*, 422 U.S. at 603 (citing *Westover*, 384 U.S. at 496-497). *Elstad*'s use of these Fourth Amendment precedents, undeniably connects purposeful or unreasonable violations of *Miranda* with broad exclusionary protection.

1) "Improper tactics" in obtaining a statement is distinct from actual coercion, and constitutes one factor in the totality of the circumstances test.

Elstad carved from its rule an exception for two types of police misconduct: "absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion." *Id.* at 314. Put another way, when deliberately coercive or improper tactics are used to obtain the initial statement a presumption of compulsion *is* warranted. Petitioner is wrong to suggest that these have the same meaning (Pet. Br. 29-30). "Improper tactics" has a distinct meaning as a type of police conduct to be deterred.

The same year as *Elstad*, this Court also noted that the review of a confession's voluntariness "is not limited to instances in which the claim is that the police conduct was 'inherently coercive.'" *Miller v. Fenton*, 474 U.S. 104, 110 (1985). "It applies equally when *the interrogation techniques were improper* only because, in the particular circumstances of the case, the confession is *unlikely to have been* the product of a free and rational will." *Id.*[27] *Elstad's* dual concerns were "actual" coercion and "improper tactics" that likely would yield a confession that was not the product of free will. The *Elstad* facts implicated neither concern. Elstad's statements were not actually coerced, nor were improper tactics used in obtaining the statements. But Hanrahan strategically elevated the inherent coercion of the stationhouse by:

- taking Seibert away from dying Darian at 3:00 a.m., with Jonathan's funeral scheduled for the next day;
- isolating her in a tiny room for 15-20 minutes to increase her stress, aware that another officer had told her they had a strong case against her;
- interrogating her incommunicado and without warnings;
- telling her that her exculpatory statements were lies and were hurting her;
- pulling his chair beside her, squeezing her arm and repeating the story he wanted to hear from her until she acquiesced to it;

[27] *See also McKune v. Lile*, 536 U.S. 24, 49 (2002) (O'Connor, J., concurring) (As suggested by the text of the Fifth Amendment, we have asked whether the pressure imposed in such situations rises to a level where *it is likely* to "compe[l]" a person "to be a witness against himself.").

- using the required warnings to cleanse his improper tactic;
- exploiting her inadmissible statement to chain her to it when she tried to return to her exculpatory statements.

The Missouri two-step is an improper tactic designed to undermine the suspect's free will and is likely to result in compelling a suspect to testify. The Missouri Supreme Court correctly considered these improper tactics as part of the totality of the circumstances surrounding Seibert's interrogation, and found that only "under circumstances that differ from those in this case" could the prosecution prove voluntariness of the first statement (Cert. Pet. A-9). It also reviewed the totality of the circumstances to determine the voluntariness of the waiver and the second statement. It found that the two-step tactic was calculated to weaken Seibert's ability to knowingly and voluntarily exercise her rights, that the waiver came during a "nearly continuous period of interrogation," by the same officials in the same surroundings, and that Hanrahan "tied the two stages of the interview together by using her statements in the first stage to correct her during the second stage." Hence, the waiver and subsequent statements were also found to be involuntary (Cert. Pet. A-9–A-12). However, the Missouri Supreme Court did not create a per se rule of exclusion, noting that different circumstances could reflect attenuation rendering the subsequent waiver and statement voluntary (Cert. Pet. A-11).

In addition to its faulty assertion that *Elstad* was concerned only with "actual coercion," Petitioner would find such coercion only if Seibert had been "terrorized, beaten or deprived of sleep or food" (Pet. Br. 32), thereby protecting the Fifth Amendment privilege only from conduct "shocking the conscience." (Pet. Br. 26). But even Petitioner's case citations prove that this is the wrong standard:

> [T]he constitutional inquiry is *not whether the conduct of state officers in obtaining the confession was shocking*, but whether the confession

> was 'free and voluntary; that is, (it) must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. In other words the person must not have been compelled to incriminate himself. We have held inadmissible even a confession secured by so mild a whip as the refusal, under certain circumstances, to allow a suspect to call his wife until he confessed. [See *Haynes v. Washington*, 373 U.S. 503 (1963)].

Malloy v. Hogan, 378 U.S. 1, 7 (1964).[28] "A finding of coercion need not depend upon actual violence by a government agent." *Arizona v. Fulminante*, 499 U.S. 279, 287 (1991). "[T]he blood of the accused is not the only hallmark of an unconstitutional inquisition." *Id.* (citing *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960)). Indeed, *Miranda* sought to neutralize the *mental* coercion inherent in the stationhouse. Fifth Amendment compulsion need not "shock the conscience."[29] This Court refuses to "blind [itself] to what experience unmistakably teaches: that even apart from the express threat, the basic techniques [of] secret and incommunicado detention and interrogation . . . are devices adapted and used to extort confessions from suspects." *Haynes*, 373 U.S. at 514-515.

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[28] The Fourteenth Amendment's Due Process Clause protects against state action that either "shocks the conscience," or interferes with rights "implicit in the concept of ordered liberty." *See Chavez*, 123 S.Ct. at 2011-2012 (Stevens, concurring and dissenting in part).

[29] *Elstad* cites *Westover,* to explain when a "break in the stream" becomes necessary. 470 U.S. at 310. This is also critical because *Westover* did not involve actual coercion – it was not "involuntary in traditional terms." *Miranda*, 384 U.S. at 357. None of the records in *Miranda's* four cases "evidence overt physical coercion or patent psychological ploys." *Id.* What mattered was the forcefully apparent "*potentiality for compulsion*," because none of the officers undertook to give warnings at the outset of the interrogation. *Id.*

In *Berkemer v. McCarty*, *supra*, this Court rejected another attempt to circumvent *Miranda,* unanimously refusing to let officers withhold warnings upon misdemeanor traffic arrests. *Id.*, 468 U.S. at 431. Petitioner Berkemer argued that officers, questioning suspects about misdemeanor traffic offenses, would not use the tactics that so troubled the *Miranda* Court. This Court disagreed. *Id.* at 432. It noted that even if the police, when in doubt about the nature of the underlying criminal conduct, could ensure compliance with the law by giving full *Miranda* warnings, "in some cases a desire to induce a suspect to reveal information he might withhold if informed of his rights would induce the police not to [warn]." *Id.* at 431, fn 13. This Court refused to encourage calculated, unwarned, custodial questioning in *Berkemer*. It must refuse here as well.

Berkemer noted the "Byzantine complexities" of condoning unwarned interrogations:

> [A]t what point in the evolution of an affair of this sort would the police be obliged to give *Miranda* warnings to a suspect in custody? What evidence would be necessary to establish that an arrest for a misdemeanor offense was merely a pretext to enable the police to interrogate the suspect (in hopes of obtaining information about a felony) without providing him the safeguards prescribed by Miranda?

Id. at 431-432. The rule Petitioner advances here begs the same complex questions: At what point in the Missouri two-step would a suspect be entitled to warnings: After the officer obtained a full or partial statement? After the officer decided that interrogation was becoming unduly coercive? When the officer decided that he wanted to procure *admissible* statements? Never? Petitioner's desire to abandon the bright-line rule would leave suspects unprotected and police unguided.

2) The Missouri two-step is premised on police officers extracting the "cat out of the bag."

Officers are keenly aware of the real world value of dragging the cat from the bag. So is the Petitioner. It described the practice in its cert. petition:

> [S]ome law enforcement officers use an interrogation strategy designed to obtain information in two stages: first, the suspect is questioned without being advised of his *Miranda* rights; and second, once an admission has been obtained (i.e., once the 'cat is out of the bag'), the suspect is carefully advised of his *Miranda* rights and questioned again.

(Cert. Pet. 4). Also in March, 2003, Petitioner described the two-step to its officers:

> [Hanrahan] had been trained to use a two-step technique designed to elicit an initial confession before reading the *Miranda* warnings, with the idea that once the suspect confessed, she would repeat the confession following the Miranda warnings . . . he had been taught that suspects are more likely to confess the second time, even after *Miranda* warnings, once they have implicated themselves.[30]

Only now, in its brief, does Petitioner reject what it knows to be true: extracting the cat from the bag will practically guarantee a second confession following belated, ineffectual warnings. Hanrahan knew what Seibert surely did not know – that the initial statement was

[30] *See* fn 1, Missouri Attorney General's *Front Line Report*, a newsletter for Missouri's law enforcement officers. http://www.ago.state.mo.us/032003fl.pdf. (last visited Oct. 3, 2003).

inadmissible.[31] He also understood that Seibert's ignorance of her rights during interrogation would leave her with the "erroneous impression that [she] ha[d] nothing to lose . . . in [deciding] to speak a second or third time." *Darwin v. Connecticut*, 391 U.S. 346, 351 (1968) (Harlan, J., concurring in part, dissenting in part); *see also United States v. Bayer*, 331 U.S. 532, 540 (1947).

In discussing "cat-out-of-the-bag," *Elstad* was unconcerned with moral or psychological "pressures to confess emanating from sources other than official coercion." *Elstad*, 470 U.S. 305. But the facts there did not implicate the danger of official coercion. Instead, it resembled the facts of three other cases.[32] *Elstad* used *Beheler, Innis* and *Mathiason* to analogize the pressure felt by Elstad. They all involved the absence of either custody or interrogation, standing in stark contrast to Hanrahan's procedure.[33]

[31] In the military justice system, an interrogating officer who is aware that a suspect has made an initial statement that would violate Article 31(b) UCMJ (Miranda's military counterpart, predating *Miranda*), can give "cleansing warnings" before re-interrogating. This cleansing warning provides that "any prior illegal admission or other improperly obtained evidence which incriminated me cannot be used against me in a trial by court-martial." *See United States v. Allen*, 59 M.J. 515, 523 (N.M.Ct.Crim.App. 2003).

[32] *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (Suspect spoke to police voluntarily. Not knowing the full consequences of talking, did not make encounter custodial); *Innis*, 446 U.S. at 303 (police did not know Innis was unusually disoriented or upset at arrest, nor were police remarks designed to elicit a response; i.e., no interrogation.); *Oregon v. Mathiason*, 429 U.S. 492, 495-496 (1977) (defendant came voluntarily to the station for ½-hour interview, and was told he was not under arrest, later leaving unhindered. He was not subjected to "official coercion" equaling pressure to confess.)

[33] *Elstad* also cites *McMann v. Richardson*, 397 U.S. 759, 767 (1970) for the proposition that "a defendant's ignorance of the full consequences of his decisions [does not necessarily] vitiate their voluntariness." *Elstad*, 470 U.S. at 316. This makes sense because in *McMann* there was no causal relationship between confession and plea.

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Harrison, *supra*, is again instructive. When the prosecution *used* Harrison's illegally-obtained first confession, resulting in Harrison's subsequent statement, this Court observed: "Having 'released the spring' by using the petitioner's unlawfully obtained confessions against him, the Government must show that its illegal action did not induce his testimony." *Harrison*, 392 U.S. at 225. *Harrison*'s observation must hold true here because the causal link between Seibert's two statements is even stronger.

The prosecutor and Hanrahan, frustrated that Seibert did not implicate herself during previous informal questioning, took her into custody to "make a case against" her. This included arresting her at 3:00 a.m., taking her from her dying son, knowing she was grief-stricken, telling her she was hurting herself by lying to them and that she needed to tell the truth because they already had a strong case, leaving her alone in a small room to increase her stress, squeezing her arm and repeating the statement they wanted her to adopt – all in the absence of warnings. Hanrahan managed to extract the cat from the bag. Then, after reciting the warnings, he exploited the unwarned statement: When Seibert tried to return to her pre-interrogation denial, he confronted her with the fact that she had told him something different just minutes before. This is cat-out-of-the-bag theory in practice at the station-house. It is not *Elstad*. By ignoring the barrier of *Miranda*, the Missouri two-step dilutes the effectiveness of warnings, resulting in an involuntary waiver.

F. The Missouri two-step is not necessary to address public safety concerns.

Petitioner urges that unwarned questioning is a "desirable" and "entirely appropriate" tool for obtaining

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McMann, 397 U.S. at 767. But a causal relationship does link Seibert's statements.

"information in connection with a terrorism plot . . . or to end an ongoing criminal activity . . . " (Pet. Br. 42, U.S. Br. 23). But *Quarles*, 467 U.S. at 649, already permits "questions reasonably prompted by a concern for the public safety." Raising the specter of terrorism here is deceiving because a legitimate interest in thwarting that evil does not require wholesale abandonment of protections for our citizens "precious" Fifth Amendment rights.

But Petitioner goes far beyond public safety concerns, suggesting that the Missouri two-step is also legitimate to aid officers in "locating accomplices or developing evidence against them . . . finding . . . drugs or other contraband; locating a crime victim; or focusing an investigation when there are multiple suspects." (Pet. Br. 42). Petitioner declares that the purpose in arresting Seibert was to "sort out the roles of the various conspirators and focus the investigation" to make appropriate charging decisions among multiple suspects (Pet. Br. 42-43). This is false. To make this argument, Petitioner omits a critical fact from its brief: Hanrahan was operating under explicit orders from the prosecuting attorney to "make a case against" Seibert directly (JA 54).

Hanrahan knew that a confession was "probably the most probative and damaging evidence that [could] be admitted against [her] . . . " *Arizona v. Fulminante*, 499 U.S. at 296 (*quoting Bruton v. United States*, 391 U.S. 123, 139-140 (1968) (White, J., dissenting)). He was not sorting evidence; he was seeking a confession. He used the technique that he was trained in: withhold the constitutionally-required warnings to more easily obtain a statement, and then use it to obtain an "admissible" duplicate. There is too great a danger that such objectively unreasonable techniques will result in involuntary waivers and statements. Therefore, when officers deliberately violate *Miranda* or fail to give warnings, when a reasonable officer under the circumstances would recognize the necessity to give them, both the warned and the unwarned statements should be presumed compelled and inadmissible. To counter that

presumption, the government must show attenuation between the statements and no exploitation. Petitioner cannot do so here.

II. SEIBERT'S WAIVER, WHICH CAME IN THE MIDDLE OF THE INTERROGATION, WAS NOT VOLUNTARY, KNOWING OR INTELLIGENT, AND RENDERED THE SUBSEQUENT STATEMENT INVOLUNTARY.

"The voluntariness of a waiver of [the Fifth Amendment] privilege has always depended on the absence of police overreaching . . . " *Connelly*, 479 U.S. at 170. The Missouri Supreme Court held that, under the totality of the circumstances, Hanrahan's overreaching rendered Seibert's waiver involuntary:

> Hanrahan's [tactic] was intended to deprive Seibert of the opportunity knowingly and intelligently to waive her *Miranda* rights. Both stages of the interview formed a nearly continuous interrogation – she was interrogated by the same officials in the same place with only minutes separating the unwarned and warned questioning. There are no circumstances that would seem to dispel the effect of the *Miranda* violation. For these reasons, Seibert's post-*Miranda* waiver and confession was involuntary and, therefore, inadmissible.

(Cert. Pet. A-12).[34] Petitioner ignores this finding, but does concede that, absent "warnings and *a valid waiver . . . any statement* obtained during custodial interrogation would carry a 'presumption of compulsion' and would not be

[34] The involuntariness of the waiver is necessary to resolving Petitioner's question presented, and it was clearly "passed upon below," allowing review by this Court. *See United States v. Williams*, 504 U.S. 36, 41 (1992).

admissible in the prosecution's case in chief." (Pet. Br. 9). Guided by *Elstad*, the Missouri Supreme Court asked whether Hanrahan used a method calculated to "undermine [Seibert's] free will." (Cert. Pet. A-9) (citing *Elstad*, 470 U.S. at 309). If the mid-stream waiver was involuntary, as the Missouri Supreme Court found, the duplicate statement is inadmissible through standard *Miranda* exclusion.

Petitioner admits that Hanrahan referenced Seibert's unwarned statement as he led her to repeat it, but states that this was not designed to pressure Seibert into "*waiving* [her] right to remain silent." (Pet. Br. 48) (emphasis in original). Petitioner struggles for a distinction because, as it acknowledges, if Hanrahan exploited the unwarned admission to pressure a waiver, "[the] waiver and subsequent statement might very well have been compelled." (Pet. Br. 48). But the constitutionally-required protections did not disappear when belated warnings were recited and a waiver was obtained (albeit involuntarily). Seibert could have invoked her rights at any time, or simply refused to answer any question asked, and this silence could not be used against her. *See Doyle v. Ohio*, 426 U.S. 610, 617 (1976); *Miranda*, 384 U.S. 473-474. In fact, it was at a critical point, as she refused to accede to Hanrahan's description of events, that he exploited the unwarned statement to correct her.

The danger is too great that these tactics will result in unwarned statements and involuntary waivers. If this Court does not apply a broad exclusionary rule to deter this misconduct, it should nonetheless affirm the Missouri Supreme Court's decision that Seibert's waiver and subsequent statement was involuntary. When police officers unreasonably withhold *Miranda* warnings at the outset of custodial interrogation, in a calculated attempt to undermine the suspect's free will, this Court must presume that the improper tactic achieved its goal and rendered the warnings impotent and the waiver involuntary.

Of course, the Government is entitled to attempt to prove attenuation between the statements and a lack of exploitation of the first statement to overcome the presumption. But it cannot do so here. The State carries a "heavy burden" to establish a valid waiver. *Barrett*, 479 U.S. 531. An express written or oral waiver is usually strong proof of its validity, but is not inevitably either necessary or sufficient. *North Carolina v. Butler*, 441 U.S. 369, 373 (1979).

> Whatever the testimony of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights. In these circumstances the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so. It is inconsistent with any notion of a voluntary relinquishment of the privilege. *Id.*

Miranda, 384 U.S. at 476.

Echoing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), *Miranda* holds that "[t]he defendant may waive effectuation" of the rights conveyed in the warnings "provided the waiver is made voluntarily, knowingly and intelligently." *Moran*, 475 U.S. at 421. "[N]othing less than the *Zerbst* standard for the waiver of constitutional rights applies to the waiver of *Miranda* rights." *Minnick*, 498 U.S. at 160 (Scalia, J., dissenting). First, the waiver must have been the product of a free and deliberate choice rather than *intimidation, coercion, or deception*; and second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of abandonment. *Moran*, 475 U.S. at 421. The totality of the circumstances must be considered in evaluating the waiver. *Butler*, 441 U.S. at 374-75. Only if the "totality of the circumstances surrounding the interrogation" reveal both an uncoerced choice and a full comprehension

may a court properly conclude that the *Miranda* rights were waived. *Id.* (citing *Fare*, 442 U.S. at 725).

In *Westover*, 384 U.S. at 496-97, this Court suppressed a confession because an unwarned, custodial interrogation preceded a warned interrogation that produced a confession. The eventual reading of warnings did not ease the pressure from the first interrogation. *Westover* noted that where continuous questioning occurs in two stages, and where the second stage's warnings come without the defendant being removed both in time and place from the surroundings of the first stage's unwarned inquisition, the second statement must be excluded.

This case involves nearly identical facts. This Court need only apply *Westover*, not extend *Miranda*, as Petitioner claims. Petitioner may reply that *Westover* involved an initial involuntary confession. However, as already discussed, the plain language of *Westover* shows otherwise. None of Miranda's companion cases "[would] have been involuntary in traditional terms." *Miranda*, 384 U.S. at 457.

Westover is the proverbial "bridesmaid" of *Miranda* and it has not gotten much play in the caselaw. This is understandable because questioning of this caliber has been rare – at least until the last decade. Certiorari review was granted in *Elstad*, in part, because "a handful of courts" had been applying *Westover*'s "break in the stream" to cases lacking "coercive circumstances." *Elstad*, 470 U.S. at 317-318. Elstad listed those examples. *Id.* at 310, fn 2. These cases declining to apply *Westover*, are factually parallel to *Elstad* – but more importantly, they are polar opposites of *Seibert*.[35]

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[35] *See, e.g., Tanner v. Vincent*, 541 F.2d 932, 937 (2nd Cir. 1976) (Second confession not "causally related to the first"; "inadvertent" defect in initial warnings); *United States v. Toral*, 536 F.2d 893, 896-897 (9th Cir. 1976) (Circumstances not inherently coercive; all questioning

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These cases show in what factual settings *Westover* does *not* apply. *Elstad* juxtaposes them with cases where *Westover* does apply – cases of "consecutive confessions" accompanied by "overtly or inherently coercive methods which raise serious Fifth Amendment and due process concerns." *Id.* Such cases "[could not] seriously . . . equate" to *Elstad*. *Id.* at 314, fn 3. But they cannot seriously be distinguished from *Seibert*.

For example, *Elstad* cited *State v. Badger*, 450 A.2d 336 (Vt. 1982) as a case that did not equate with *Elstad*. The *Badger* Court relied on *Westover* to hold that the coercive circumstances surrounding the first confession infected a later confession, and that intervening events did not break the causal chain or dissipate its taint. *Id.* at 343.

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occurred "in the security of Toral's home."); *United States v. Knight*, 395 F.2d 971, 973-975 (2nd Cir. 1968) ("short interrogation" in Knight's home, where he invited police; no "causal relationship" between police misconduct and Knight's confession to FBI.); *State v. Derrico*, 434 A.2d 356, 365-366 (Conn. 1980) (Incomplete initial warnings resulted from Derrico's objections and resistance; first "confession" a general statement, second detailed.); *State v. Holt*, 354 So.2d 888, 890 (Fla.App. 1978) (fact that first of two confessions possibly obtained by improper influences does not necessarily make subsequent confession inadmissible, *provided* improper influences removed.); *Fried v. State*, 402 A.2d 101, 102 (Md.App., 1979) (Cat not improperly induced out of bag, but released voluntarily.); *Com. v. White*, 232 N.E.2d 335, 341 (Mass. 1967) (relation between confessions not so close that facts of one control the other.); *State v. Sickels*, 275 N.W.2d 809, 813-814 (Minn. 1979) (Officers did not detain solely to question in custodial setting; incriminating statement followed warnings.); *State v. Dakota*, 217 N.W.2d 748, 753 (Minn. 1974) (One pre-warning question as to "what happened" did not overcome will such that subsequent warnings had no impact.); *State v. Raymond*, 232 N.W.2d 879, 886 (Minn. 1975) (Raymond not in custody for four days between two confessions; with "time to reflect and seek advice" his will was not so overcome by first admission such that subsequent warnings had no impact.); *Com. v. Chacko*, 459 A.2d 311, 316 (Pa. 1983) (Chacko initiated conversation with police; and police did not attempt to exploit his first statement.)

> A mere fifteen hours after obtaining a confession by concededly illegal methods, the officer used that confession to extract a second one, *wholly for the purpose of* supplementing the first confession. The warnings, designed as a prophylactic measure . . . were insufficient to cure such blatant abuse or to compensate for the coercion in this case.

Id. The "coercive" circumstances in *Badger* involved a late-night interrogation, the deliberate withholding of *Miranda* warnings, "close and intense" questioning of a 16-year old (whose father was present during the entire interrogation), who became emotionally upset and began crying. After 50 minutes, Badger confessed, and "[o]nly then did the police issue the *Miranda* warnings." *Id.* at 340.[36] Seibert cannot be distinguished from the consecutive confession cases to which *Elstad* would have applied *Westover* to exclude the subsequent statement. This Court should find that Seibert's waiver and subsequent statements were involuntary under *Westover*.

CONCLUSION

The Missouri two-step is the classic example of an improper tactic calculated to undermine a suspect's free will. Such tactics will very often result in involuntary waivers and statements, as it did here, which is why this Court must presume compulsion and exclude evidence

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[36] *See also*, (*People v. Saiz*, 620 P.2d 15 (Colo. 1980) (two hour unwarned custodial interrogation of 16-year-old, violating state law requiring parent's presence, culminating in visit to crime scene); *People v. Bodner*, 75 A.2d 440 (1980) (unwarned confrontation at police station and at scene of crime between police and retarded youth with mental age of eight or nine). Justice Stevens notes that *Elstad* highlighted these cases as examples of "unusually coercive police interrogation procedures." *Chavez*, 123 S.Ct. at 2011.

taken from the willful or unreasonable withholding of warnings. Such exclusion is the only effective way to deter misconduct, ensure the protection of the privilege, and guarantee that involuntary statements will not infect the reliability of the evidence at trial.

If mid-stream warnings are condoned, the "Missouri two-step" will abound. *Miranda* sought an end to secret interrogations of unwarned suspects, *Westover* declared that this tactic of midstream warnings between two parts of an interrogation would result in a presumptively invalid waiver, and *Elstad* rejected even the "apocalyptic" thought of the Missouri two-step. But the apocalypse has arrived. The real question now is whether *Miranda* will remain a potent protector of the privilege, or devolve into an optional strategic tool for the police. Seibert's second statement must be suppressed.

The judgment of the Supreme Court of Missouri should be affirmed.

Respectfully submitted,

AMY M. BARTHOLOW
Assistant Public Defender
3402 Buttonwood Drive
Columbia, MO 65202
Phone: (573) 882-9855
Fax: (573) 875-2594

Counsel for Respondent